No. 657

Office - Supreme Court, U. S.
FILED
JAN 31 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1943.

WESTERN CARTRIDGE COMPANY, WINCHESTER REPEATING ARMS COMPANY DIVISION,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

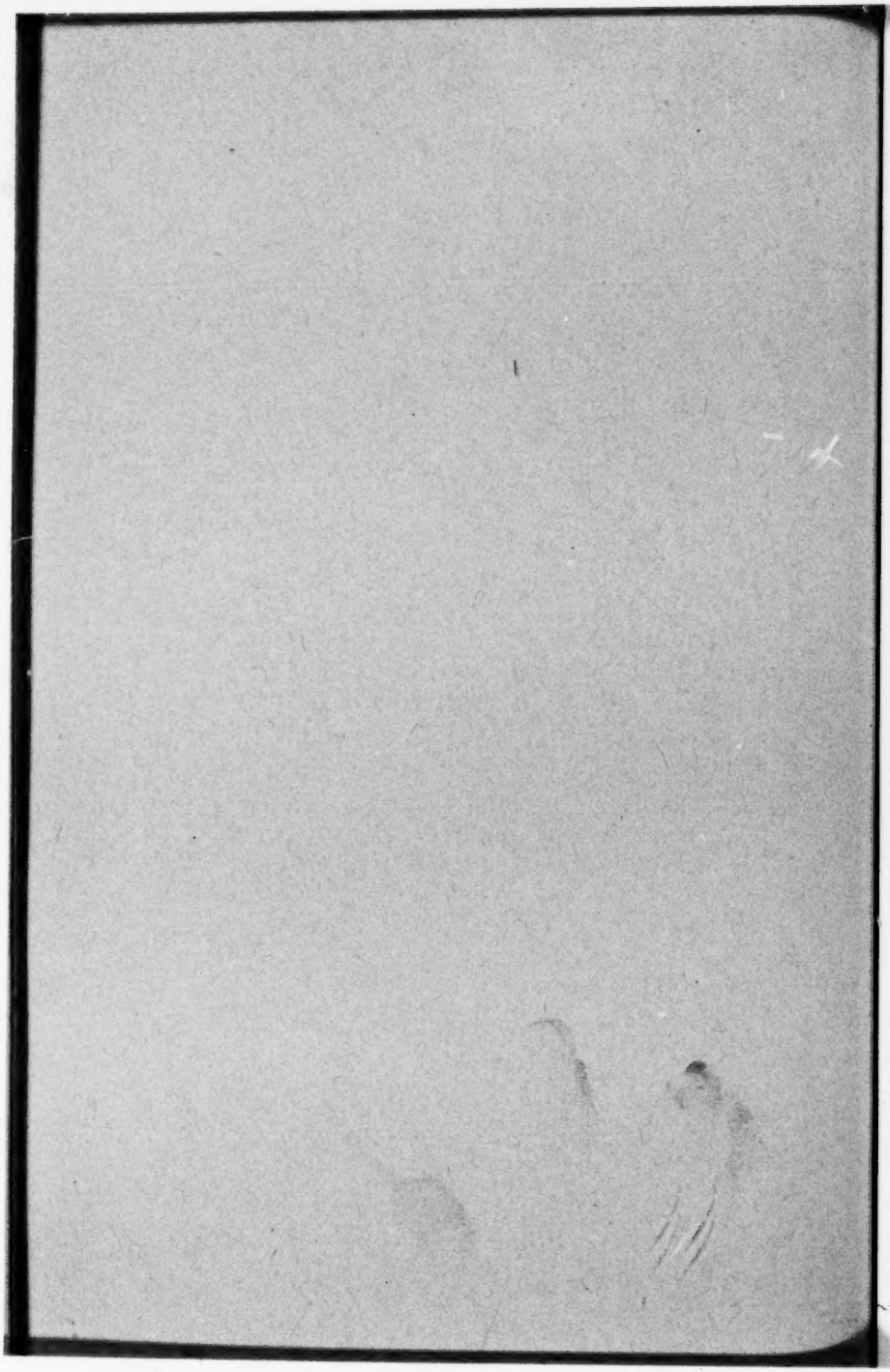
PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

ALLAN SESERMAN,
Attorney for Petitioner.

ADDISON C. CUTCHELL & SON, LAW PRINTERS, BOSTON.



Subject Index.

	Page
Petition	1
Question presented	2
Petitioner's position	2
Statute	2
Statement of the case	2
Reasons for granting the writ	2
Brief	4
Opinions below	4
Jurisdiction	4
Question presented	4
Statute involved	4
Statement of the case	4
Petitioner's position	6
Argument	6

Table of Authorities Cited.

CASES.

Inland Steel Co. v. N.L.R.B., decided by Seventh Circuit Court of Appeals	8, 9, 10
Jordan v. Massachusetts, 225 U.S. 167	8
Montgomery Ward & Co. v. N.L.R.B., 103 Fed. (2d) 47	9
Morgan v. United States, 304 U.S. 1	8
N.L.R.B. v. Phelps, decided June 22, 1943	9
Ohio Bell Tel. Co. v. Public Utilities Comm., 301 U.S. 292	7
Union Pacific Railway Co. v. Syas, 246 Fed. 561	8, 10
Tumey v. Ohio, 273 U.S. 510	7

STATUTES.

	Page
Judicial Code as amended, secs. 239, 240, U.S.C. Title 28, secs. 346, 347	4
National Labor Relations Act, 49 Stat. 449, secs. 2 (6), (7)	4, 5
National Labor Relations Act, 49 Stat. 449, secs. 8 (1), (3)	4, 5
National Labor Relations Act, 49 Stat. 449, sec. 8 (2)	5
National Labor Relations Act, 49 Stat. 449, sec. 10 (e)	4

Supreme Court of the United States.

OCTOBER TERM, 1943.

WESTERN CARTRIDGE COMPANY, WINCHESTER REPEATING ARMS COMPANY DIVISION,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Western Cartridge Company, Winchester Repeating Arms Company Division, prays a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered in this cause on November 4, 1943, enforcing the order of the National Labor Relations Board of August 14, 1942, and further ordering the petitioner to notify the Regional Director of the Second Region of the Board in writing within ten days of the Court's decree what steps it has taken to comply with said order.

Question Presented.

Does the fact that the Court's judgment may be justified on the merits obviate the requirement of a fair trial?

Petitioner's Position.

The petitioner's position is that, regardless of the possible outcome on the merits, the petitioner is entitled to a fair hearing and a trial by an unbiased judge.

Statute.

The statute pertinent to this cause is the National Labor Relations Act, 49 Stat. 449, 29 U.S.C. secs. 151-166 (1940).

Statement of the Case.

This case involves the enforcement by the Circuit Court of Appeals for the Second Circuit of an order of the National Labor Relations Board. A more complete statement is in the accompanying brief in support of this petition.

Reasons for Granting the Writ.

The decision of the Circuit Court of Appeals is believed to be in conflict with the applicable decisions of this Court, and more particularly with the decisions of this Court in the cases of *Tumey* v. *Ohio,* 273 U.S. 510; *Ohio Bell Telephone Co.* v. *Commission,* 301 U.S. 292; *Jordon* v. *Massachusetts,* 225 U.S. 167; and *Morgan* v. *United States,* 304 U.S. 1.

The decision of the Circuit Court of Appeals embodies an important principle of federal law concerning which the several Circuit Courts of Appeals appear to be in conflict. *N.L.R.B.* v. *Phelps,* decided June 22, 1943; *Inland Steel Co.* v. *N.L.R.B.,* 109 Fed. (2d) 9; *Montgomery Ward & Co.* v. *N.L.R.B.,* 103 Fed. (2d) 47; *N.L.R.B.* v. *Ford Motor Co.,* 114 Fed. (2d) 905; and *Union Pacific Railway Co.* v. *Syas,* 246 Fed. 561.

The decision of the Circuit Court of Appeals in the case at bar appears to have so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

Wherefore it is respectfully requested that this petition for a writ of certiorari be granted.

ALLAN SESERMAN,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Circuit Court of Appeals, filed on November 4, 1943, decreeing enforcement of the order of the National Labor Relations Board, appears in the original certified copy of the record. The order of the National Labor Relations Board appears in the same copy.

Jurisdiction.

The jurisdiction of this Court is involved under section 10 (e) of the National Labor Relations Act, 49 Stat. 449, and sections 239 and 240 of the Judicial Code as amended, U.S.C. Title 28, secs. 346 and 347.

Question Presented.

This is stated in the petition (*ante*, p. 2).

Statute Involved.

This is stated in the petition (*ante*, p. 2).

Statement of the Case.

On January 17, 1942, the Union filed its second amended charge with the National Labor Relations Board for the Second Region alleging unfair labor practices within the meanings of section 8 (1) and (3). On the 24th day of February, 1942, the Board issued its complaint alleging violations of section 8 (1) and (3) and section 2 (6) and (7). On March 23, 1942, the Union filed a supplemental

charge alleging an unfair labor practice within the meanings of section 8 (1) and (3) of the Act in regard to another employee (2-C-4125). On February 24, 1942, the Board issued its notice of hearing to be held on the 23d day of March at 10 o'clock in the forenoon at Aldermanic Chambers, City Hall, 161 Church Street, New Haven, Connecticut. Thereafter, on February 25, 1942, the respondent filed its answer to the complaint, denying the unfair labor practices charged.

A hearing was held at New Haven, Connecticut, from March 23, 1942, to April 2, 1942. On April 1, 1942, a second supplemental charge was filed by the Union, alleging unfair labor practices within the meanings of section 8 (1) and (2) of the Act. On April 2, 1942, the Board issued its amended complaint, alleging unfair labor practices within the meanings of section 8 (1), (2) and (3) and section 2 (6) and (7) of the Act. On April 2, 1942, the parties executed a stipulation disposing of the alleged violation by the respondent of section 8 (2) of the Act. On April 18, 1942, the Trial Examiner filed his intermediate report, finding violations of section 8 (1) and (3) and recommending that petitioner cease and desist from such violations and take certain affirmative actions. Thereafter the respondent granted the petitioner's request to be heard in oral argument before the Board and scheduled hearing for that purpose in Washington, D.C. Subsequently the petitioner filed exceptions to the intermediate report, requesting the Board to remand the cause to a new Trial Examiner for a new hearing, which was denied. Finally, on August 14, 1942, the respondent issued its decision and order.

Thereafter the respondent petitioned the Circuit Court of Appeals for the Second Circuit for enforcement of its order. The cause was heard on October 7, 1943, and on November 4, 1943, a decision of the Court was entered en-

forcing the order of the respondent and further ordering the petitioner to notify the Regional Director for the Second Region in writing within ten days what steps it had taken to comply with said order.

Petitioner's Position.

The petitioner's position here has been stated in the petition (*ante*, p. 2).

Argument.

The petitioner should not be ordered to comply with an order of the Board if the judicial requirements for a fair trial have not been met.

In regard to the fair hearing, the Court below had this to say: "The conduct of this trial examiner left much to be desired. Over the obvious reluctance of the Board's Attorney, he insisted upon going into a matter not covered by the charges filed. That had to do with what had been a company-sponsored association of employees, sometimes called the Plan and sometimes the Council, which turned out to have become so defunct that counsel for the board and for the respondent in the end disposed by stipulation of the apparently inconsequential issue so created. He prolonged the hearings unduly by needlessly taking over the examination of witnesses from an apparently competent attorney for the board who was present to prosecute the charges; and he generally distinguished himself for his over-speaking. *In so doing he did much to destroy any faith in his impartiality, and had this been a close case his conduct might have been sufficient cause for a denial of this petition.* Montgomery Ward & Co. v. National Labor Relations Board, 8 Cir., 103 F. 2d 147. *The result was right,* and though the trial examiner's conduct may have caused

the respondent needless trouble and expense, whatever harm was done to the cause of good administration of the Act did not make the order itself erroneous." (Italics mine.)

When the Circuit Court of Appeals in the case at bar stated that "the result was right" it took upon itself a conclusion which might have been determined entirely differently on the facts had the evidence been impartially weighed and properly presented. Thus the Court below places importance on a possible outcome on the merits, in preference to the fulfillment of the basic requirement imposed by law on the National Labor Relations Board to conduct a fair hearing. The petitioner believes that any conclusion disregarding the requirements of a fair trial on the basis that the result was right is wholly speculative and not in accord with the decided cases.

In *Tumey* v. *Ohio*, 273 U.S. 510, this Court said: "No matter what the evidence was against him, he had the right to have an impartial judge," thus sustaining the principle that a trial by a biased judge is not in conformity with due process. As this Court put it in the matter of *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292: "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. West Ohio Gas Co. v. Public Utilities Comm'n (No. 1), supra, p. 70; West Ohio Gas Co. v. Public Utilities Comm'n (No. 2), 294 U.S. 79; Los Angeles Gas & Electric Corp. v. Railroad Commission, 289 U.S. 287, 304. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power

has been bestowed so freely, that the 'inexorable safeguard' (St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 73) of a fair and open hearing be maintained in its integrity. Morgan v. United States, 298 U.S. 468, 480, 481; Interstate Commerce Comm'n v. Louisville & N.R. Co., supra. The right to such a hearing is one of 'the rudiments of fair play' (Chicago, M. & St. P. Ry. Co. v. Polt, 232 U.S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement. West Ohio Gas Co. v. Public Utilities Comm'n (No. 1), (No. 2), supra; Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 682. Cf. Norwegian Nitrogen Co. v. United States supra. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." Cf. *Morgan* v. *United States*, 304 U.S. 1.

In the matter of *Jordan* v. *Massachusetts*, 225 U.S. 167, this Court said: "Due process implies a tribunal both impartial and mentally competent to afford a hearing." It is the petitioner's contention that in the above-cited cases this Court leaves little doubt that "impartial" does not mean "limited partiality." It will be pointed out that the Circuit Court of Appeals in the instant case makes the first qualification affecting the partiality of a Trial Examiner based upon the fact that the Court in its opinion felt that the result was right.

In the decision in the case of *Inland Steel Co.* v. *N.L.R.B.*, decided by the Seventh Circuit Court of Appeals, the Court takes a position contrary to that taken by the Circuit Court of Appeals in the instant case. There the Court said: "And the fact that the Court's judgment may be justified on the merits does not obviate the requirement of a fair trial." *Union Pacific Railway Company* v. *Syas*, 246 Fed. 561.

This view is shared by the Circuit Court of Appeals for the Fifth Circuit in the case of *N.L.R.B.* v. *Phelps,* decided June 22, 1943, in which case that Court cites the same authorities and repeats the language of the Circuit Court of Appeals in the Inland Steel Co. case.

The same may be said of the Eighth Circuit Court of Appeals in the case of *Montgomery Ward & Co.* v. *N.L.R.B.,* 103 Fed. (2d) 47, in which case the Court, in addition to affirming the opinion of the Circuit Court of Appeals for the Fifth and Seventh Circuits, states: "This record is full of instances of hostile and searching examination of witnesses who might be expected to be favorable to the Company or the intervenor while similar action does not appear as to witnesses favorable to the complainant. The extreme activity of the examiner in questioning of witnesses is quite evident. . . . Counsel for the Board seems to have been proficient and this exaggerated participation by the examiner is not commendable—it is likely to as it did here, shade into partisan activity."

In the case below, the Trial Examiner, as in the case of Montgomery Ward & Co., appeared hostile and conducted a searching examination of the witnesses who might be expected to be favorable to the company, while similar action does not appear as to witnesses favorable to the complainant. As a matter of fact, as compared to the complete cross-examination of the petitioner's witnesses, the Trial Examiner did not ask a single question of the main witness for the complainant (Record, pp. 60-91).

We find the language of the Court below in the case at bar as follows: "There was ample evidence that both Amato and Thompson had before their discharge been active in promoting the cause of the Union and that Thompson had been elected its chief steward—all of which the management, plainly anti-union in its attitude well knew. The reason the respondent gave for the discharge of

Amato was his calling a 'Counsellor of employees,' who had the rank of a superintendent without that title, an obscene name. There was apparently credible evidence to support a finding that Amato did do just that, but he denied it and one employee seemingly near enough to have heard him, had he done so, testified that he did not hear it. The Trial Examiner saw fit to believe the denial instead of the witnesses who testified that they heard Amato call Bernstein the vile name. The Board found likewise."

The petitioner contends that, since the Trial Examiner made his findings and recommendations based upon his own conclusions (by admitting to the success of his own cross-examination of petitioner's witnesses), the Court below erred in permitting such fact-finding to be non-reviewable in the face of the petitioner's claim that it had not received a fair hearing.

As was said in *Union Pacific Railway Co.* v. *Syas*, 246 Fed. 561: "No judgment is just if not obtained by due process of law; otherwise, courts could enter judgments without trial."

There perhaps is no clearer statement of the petitioner's contention than that which is stated by the Court in the Inland Steel Co. case: ". . . The Act authorized the Board to enter an order upon the complaint alleging unfair labor practices only after a hearing. This means a trial by a tribunal free from bias and prejudice and embued with a desire to accord to the parties equal consideration. There is perhaps no more important right to which litigants are entitled than that they be given such a trial." The decision of the Court below in its entirety confuses rather than clarifies the issue and speculates on a conclusion for reasons known only to it and which emulates expediency rather than law.

By its Attorney,

ALLAN SESERMAN.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	6
Conclusion	11
Appendix	12

CITATIONS

Cases:

Bethlehem Steel Co. v. *National Labor Relations Board*, 120 F. (2d) 641 (App. D. C.)	7
Burk Bros. v. *National Labor Relations Board*, 117 F. (2d) 686 (C. C. A. 3) certiorari denied, 313 U. S. 588	10
Continental Box Co. v. *National Labor Relations Board*, 113 F. (2d) 93 (C. C. A. 5)	7
Cupples Co. Manufacturers v. *National Labor Relations Board*, 106 F. (2d) 100 (C. C. A. 8)	7
Federal Radio Commission v. *Nelson Brothers Co.*, 289 U. S. 266	10
Inland Steel Co. v. *National Labor Relations Board*, 109 F. (2d) 9 (C. C. A. 7)	7
Jordon v. *Massachusetts*, 225 U. S. 167	8
Montgomery Ward & Co. v. *National Labor Relations Board*, 103 F. (2d) 147 (C. C. A. 8)	7
National Labor Relations Board v. *Air Associates, Inc.*, 121 F. (2d) 586 (C. C. A. 2)	7, 10
National Labor Relations Board v. *Elkland Leather Co.*, 114 F. (2d) 221 (C. C. A. 3), certiorari denied, 311 U. S. 705	10
National Labor Relations Board v. *Ford Motor Co.*, 114 F. (2d) 905 (C. C. A. 6), certiorari denied, 312 U. S. 689	7, 10
National Labor Relations Board v. *Ed. Friedrich, Inc.*, 116 F. (2d) 888 (C. C. A. 5)	7
National Labor Relations Board v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333	7
National Labor Relations Board v. *Oregon Worsted Co.*, 94 F. (2d) 671 (C. C. A. 9)	10
National Labor Relations Board v. *Phelps*, 136 F. (2d) 562 (C. C. A. 5)	8

Cases—Continued. Page

National Labor Relations Board v. *Remington, Rand, Inc.*, 94 F. (2d) 862, certiorari denied, 304 U. S. 576 7

National Labor Relations Board v. *Stackpole Carbon Co.*, 105 F. (2d) 167 (C. C. A. 3), certiorari denied, 308 U. S. 605 7

National Labor Relations Board v. *Weirton Steel Co.*, 135 F. (2d) 494 (C. C. A. 3) 7, 10

Ohio Bell Telephone Co. v. *Public Utilities Commission*, 301 U. S. 292 8

Subin v. *National Labor Relations Board*, 112 F. (2d) 326 (C. C. A. 3), certiorari denied, 311 U. S. 673 7

Tumey v. *Ohio*, 273 U. S. 510 ..... 8, 9

Union Pacific Railroad Co. v. *Syas*, 246 Fed. 561 (C. C. A. 8) 8

Statute:

National Labor Relactions Act, Act of July 5 ,1935, c. 372, 49 Stat. 449 (29 U. S. C., 151 *(et seq.)*:

Sec. 7 12

Sec. 8 (1) 12

Sec. 8 (3) 12

Sec. 10 (e) 12

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 657

WESTERN CARTRIDGE COMPANY, WINCHESTER REPEATING ARMS COMPANY DIVISION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 963–967) is reported in 138 F. (2d) 551. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 905–949) are reported in 43 N. L. R. B. 179.

JURISDICTION

The decree of the court below was entered on January 11, 1944 (R. 968–970). The petition for a writ of certiorari was filed on January 31, 1944.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether under the circumstances of this case petitioner was denied a fair hearing because of the conduct of the trial examiner who presided at the taking of the evidence.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra,* pp. 12–13.

STATEMENT

After the filing by the Union[1] of charges that petitioner had violated Sections 8 (1) and (3) of the Act (R. 751–752), the Board issued a complaint against petitioner alleging the commission of unfair labor practices under these sections (R. 745–748). Petitioner answered, and a hearing was held before a trial examiner of the Board on March 23, 24, and 30 and April 2, 1942 (R. 4–741). During the course of the hearing evidence introduced indicated that petitioner had also committed unfair labor practices under Section 8 (2) of the Act by dominating, interfering

[1] United Electrical Radio & Machine Workers of America, C. I. O. (R. 763).

with the administration of, and contributing support to, the Employees Representation Plan and the Winchester Council. As a result, the Union, on April 1, 1942, filed supplemental charges that petitioner had violated Section 8 (2) of the Act (R. 776–777), and the Board, on April 2, 1942, issued an amended complaint based thereon (R. 778–782). On the latter date the petitioner entered into a stipulation consenting to the entry of an order by the Board and a decree by any appropriate circuit court of appeals requiring petition to cease and desist from its violations of Section 8 (1) and (2) of the Act and to withdraw recognition from and disestablish the dominated labor organizations (R. 784–790).

On April 18, 1942, the trial examiner issued his intermediate report finding that petitioner had discriminatorily discharged three employees in violation of Section 8 (1) and (3) of the Act and had in other respects interfered with, restrained, and coerced its employees in violation of Section 8 (1) of the Act (R. 843–880). Thereafter, on May 8, 1942, petitioner filed with the Board a motion to remand the case to another trial examiner for the asserted reason that the trial examiner who had conducted the hearing was prejudiced against witnesses of petitioner, that he permitted matters to be discussed before him which were in their nature prejudicial to petitioner, and that the Board attorney who tried

the case assisted the trial examiner in acts which by their nature were prejudicial to petitioner (R. 882–883). The motion gave no further particulars as to the respects in which the trial examiner was allegedly disqualified. In petitioner's exceptions to the intermediate report, filed on May 28, 1942 (R. 888–899), the basis for its charges of disqualification was stated as follows: At the opening of the hearing the trial examiner permitted a discussion before him relative to a possible settlement of the case (R. 891);[2] he required counsel for petitioner to explain the relevance of a certain line of testimony which the latter was introducing into the record (R. 892, 229–230); the trial examiner's statement that the employment record of a witness subsequent to his discharge would be relevant only in the event there was an order of reinstatement disclosed he was conducting the hearing in an unorthodox manner (R. 892, 899, 236–237); the manner in which the trial examiner resolved certain conflicting testimony in his intermediate report disclosed his prejudice (R. 893–898); certain questions put by the trial examiner to a witness constituted an attempt to "snare a witness into an uncomfortable position" (R. 897, 401–403); the trial examiner showed his prejudice by asking certain questions

[2] The record discloses that the reference to settlement negotiations was introduced into the record by petitioner's own counsel to support his request for a continuance of the hearing (R. 10–17).

so improper that he himself withdrew them when so requested by counsel for petitioner (R. 897, 607, 647); the trial examiner improperly participated in the discussion which took place in the oral argument before him (R. 897–898, 705–741); and the trial examiner improperly participated in the questioning of witnesses (R. 899).

The Board, after receiving the briefs of petitioner and hearing oral argument, on August 14, 1942, issued its decision in which it reviewed the evidence extensively and made its own findings of fact and conclusions of law (R. 905–945). It considered petitioner's charges that the trial examiner was biased and prejudiced, and found them groundless (R. 914–915). The Board found that petitioner, in violation of Section 8 (1) and (3) of the Act (R. 929–930, 934, 941), had discharged three employees because of their union membership, and that through its supervisory employees it had engaged in other antiunion conduct and coerced its employees in violation of Section 8 (1) of the Act (R. 942). The Board ordered petitioner to cease and desist from the unfair labor practices found, to reinstate the discharged employees with back pay, and to post appropriate notices (R. 945–949).[3]

[3] Pursuant to the stipulation entered into at the hearing with respect to an alleged violation by petitioner of Section 8 (2) of the Act, the Board also ordered petitioner to cease and desist from its alleged violation and to disestablish a labor organization alleged to have been dominated by it (R. 947–949).

On December 18, 1942, the Board filed a petition for enforcement of its order in the court below (R. 958–963). On November 3, 1943, the court handed down its decision enforcing the Board's order in full (R. 963–967). On January 11, 1944, the court entered its enforcement decree (R. 968–970).

ARGUMENT

The sole question presented is whether the conduct of the trial examiner denied petitioner a fair hearing. Not a single instance of alleged misconduct is set forth in the petition. The instances of alleged misconduct relied upon by petitioner before the Board have been summarized in the statement (p. 3–5, *supra*). They are not of such a character as to vitiate the proceedings, especially where, as in the instant case, the Board itself extensively reviewed the record and issued its own findings and order. The court below properly held that petitioner, having failed to show that it suffered any prejudice by reason of the alleged misconduct of the trial examiner, could not thereby defeat the Board's order (R. 966). Decisions of this and other courts have uniformly held that, in the absence of prejudice, irregularities in the hearing afford no ground for setting aside the

Board's orders.[4] The case therefore presents no question warranting review.

Each of the cases with which petitioner claims a conflict (Pet. 3) turns on its own facts. In *Inland Steel Co.* v. *National Labor Relations Board,* 109 F. (2d) 9 (C. C. A. 7) and *Montgomery Ward & Co.* v. *National Labor Relations Board,* 103 F. (2d) 147 (C. C. A. 8) the court held that the examiners, despite timely objections, improperly caused pertinent proceedings to be omitted from the record (109 F. (2d) at 13–14;

[4] *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 350–351; *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. (2d) 586, 589 (C. C. A. 2); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 873 (C. C. A. 2), certiorari denied, 304 U. S. 576; *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. (2d) 494, 496 (C. C. A. 3); *Subin* v. *National Labor Relations Board* 112 F. (2d) 326, 332 (C. C. A. 3), certiorari denied, 311 U. S. 673; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 177 (C. C. A. 3), certiorari denied, 308 U. S. 605; *National Labor Relations Board* v. *Ed. Friedrich, Inc.*, 116 F. (2d) 888, 889 (C. C. A. 5); *Continental Box Co., Inc.* v. *National Labor Relations Board*, 113 F. (2d) 93, 96 (C. C. A. 5); *National Labor Relations Board* v. *Ford Motor Co.*, 114 F. (2d) 905, 909 (C. C. A. 6), certiorari denied, 312 U. S. 689; *Cupples Co. Manufacturers* v. *National Labor Relations Board*, 106 F. (2d) 100, 113 (C. C. A. 8); *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. (2d) 641, 651–653 (App. D. C.).

103 F. (2d) at 149–151) and improperly restricted employers' attorneys in their examination of witnesses (109 F. (2d) at 18; 103 F. (2d) at 151–156). It is not contended that in the instant case any part of the proceedings was omitted from the record or that the examiner failed to accord petitioner full opportunity to introduce evidence, cross-examine witnesses called by the Board, and otherwise meet the evidence against it. In *National Labor Relations Board* v. *Phelps,* 136 F. (2d) 562 (C. C. A. 5) relied on by petitioner (Pet. 9), the court found that the examiner had procured a stipulation under false pretenses and subsequently used it to institute proceedings against another party (136 F. (2d) at 564–565). No claim is made that such misconduct occurred in the instant case.

Petitioner's further assertion (Pet. 7–8) that the decision of the court below is in conflict with the decisions of this Court in *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 304–305; *Tumey* v. *Ohio,* 273 U. S. 510, 522; and *Jordan* v. *Massachusetts,* 225 U. S. 167, 176, is also without foundation. Those cases involved, respectively, a commission's use of matters outside the record, a judge's pecuniary interest, and a juror's mental competency. None of these elements is to be found here. Similarly, *Union Pacific Railroad Co.* v. *Syas,* 246 Fed. 561 (C. C. A. 8), cited by petitioner (Pet. 8, 10), involved

the submission of a prejudicial issue to the jury. Each of these cases turns on its own facts and raises no conflict.

Petitioner strongly urges that the decision below departs from the salutary rule announced by this Court in the *Tumey* case, namely, that "no matter what the evidence was against him [the defendant], he had the right to have an impartial judge" (273 U. S. at 535). Unlike the *Tumey* case, however, there is no basis in this record for any claim that the trial examiner was interested, pecuniarily or otherwise, in the outcome of the proceeding before him. While the conduct of the trial examiner may have "left much to be desired," as the court below characterized it (R. 966), the record does not support the inference that he was hostile to petitioner or biased in favor of the Board. The trial examiner may have indulged in lengthy and perhaps unnecessary interrogation of petitioner's witnesses; but this is not equivalent to a lack of the requisite impartiality. Petitioner relies upon the statement of the court below that the trial examiner "prolonged the hearings unduly by needlessly taking over the examination of witnesses * * *. In so doing he did much to destroy any faith in his impartiality, and had this been a close case his conduct might have been sufficient cause for the denial of this petition" (R. 966). In so stating, however, the court below was holding what the record

plainly shows, namely, that petitioner has not suffered any prejudice because of the trial examiner's alleged misconduct. Moreover, no question has been raised as to the impartiality of the Board, and it is the Board, not the trial examiner, which made the findings forming the basis for the order which was enforced by the court below. *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. (2d) 586, 588 (C. C. A. 2).[5] The Board itself reviewed the evidence and made its own findings of fact and conclusions of law. These findings and conclusions were reached by the Board after petitioner had called to its attention the alleged misconduct on the part of the trial examiner. The Board sifted petitioner's charges and found them without merit (R. 914–915). There is no basis in the record, therefore, for the belief that the Board was influenced by the alleged partiality of the trial examiner.

In sum, the court below properly held that the conduct of the trial examiner had not, on the record presented, denied petitioner the imparti-

[5] Accord: *National Labor Relations Board* v. *Elkland Leather Co.*, 114 F. (2d) 221, 225 (C. C. A. 3), certiorari denied, 311 U. S. 705; *Burk Brothers* v. *National Labor Relations Board*, 117 F. (2d) 686, 688 (C. C. A. 3), certiorari denied, 313 U. S. 588; *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. (2d) 494, 496 (C. C. A. 3); *Ford* case, *supra*, at p. 909; *National Labor Relations Board* v. *Oregon Worsted Co.*, 94 F. (2d) 671, 672 (C. C. A. 9); cf. *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, 285–286.

ality of judgment to which it was entitled. Its decision presents no conflict with decisions of this or other courts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

ALVIN J. ROCKWELL,
General Counsel,
RUTH WEYAND,
HELEN F. HUMPHREY,
Attorneys,
National Labor Relations Board.

FEBRUARY 1944.

APPENDIX

The pertinent provisions of the National Labor Relations Act, Act of July 5, 1935, c. 372, 49 Stat. 449 (29 U. S. C. 151 *et seq.*), are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

SEC. 10 * * *

(e) * * * Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and en-

forcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1944

Office - Supreme Court, U
FILED
APR 19 1944
CHARLES ELMORE CROPL
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 657.

WESTERN CARTRIDGE COMPANY, WINCHESTER REPEATING ARMS COMPANY DIVISION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REVIEW.

ALLAN SESERMAN,
Attorney for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 657.

WESTERN CARTRIDGE COMPANY, WINCHESTER REPEATING ARMS COMPANY DIVISION,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REVIEW.

The petitioner respectfully presents for further consideration certain detailed information which had been omitted from the petitioner's previous petition because the petitioner was of the opinion that such matters were argument and that full opportunity to be heard on those matters would have been given later had this Honorable Court granted its petition for certiorari. In requesting reconsideration, the petitioner respectfully requests this Honorable Court to weigh the similarity between the facts of the instant case and those contained in the case of *Montgomery Ward & Co. v. National Labor Relations Board,* 103 Fed. (2d) 47.

In the Montgomery Ward case the Court stated: "This record is full of instances of hostile and searching examination of witnesses who might be expected to be favorable

to the Company . . . while similar action does not appear as to witnesses favorable to the complainant. The extreme activity of the examiner in questioning of witnesses is quite evident . . . Counsel for the Board seems to have been proficient and this exaggerated participation by the examiner is not commendable—it is likely, as it did here, to shade into partisan activity." In the instant case the Trial Examiner conducted a hostile and searching examination of all the witnesses for the respondent. Not only does the record show that the examination was hostile, but that it was tricky and highly unethical as well, and indicated a prosecutor's mind rather than that of an arbiter. An illustration of such hostility is appended hereto and marked "Appendix A."

In the instant case also the record shows that the Trial Examiner did not ask a single question of the main witness for the complainant (R. pp. 60-91). Nor in fact will the record show that there was any sincere examination conducted by the Trial Examiner to ascertain the facts from the witnesses for the Board, but that every witness for the respondent was taken in hand for cross-examination by the Trial Examiner.

I pray this Honorable Court's indulgence and I do not intend that this Honorable Court should feel that I am not cognizant of the fact that a judge may inquire into facts and question witnesses in order to clarify the facts, the better to enable him to render a decision; but when a cross-examination of witnesses is conducted by a Trial Examiner for the obvious purpose of discrediting the witnesses' testimony, it results immediately in activity bordering upon partiality—partiality in the sense that the Trial Examiner then becomes personally interested in the outcome of the proceedings. As the Court below stated in its decision (fol. 969), "The reason the respondent gave for the discharge of Amato was his calling a 'coursellor of em-

ployees,' who had the rank of a superintendent without that title, an obscene name. There was apparently credible evidence to support a finding that Amato did do just that . . . The trial examiner saw fit to believe the denial instead of the witnesses who testified that they heard Amato call Bernstein the vile name. The board found likewise." Is it reasonable to deduce that, since the Court below found that there was credible evidence to support a finding to substantiate the respondent's position (that being the weight of the testimony) a reason be found why the Trial Examiner made a finding as he did against the weight of the testimony? We respectfully submit there was a reason. That reason was the bias and prejudice of the Trial Examiner towards the respondent. How else could a Trial Examiner arrive at a conclusion that several witnesses for the respondent who asserted they heard this witness call the superintendent this vile name, as against the lone denial by the complaining ex-employee who supplemented his denial by stating, "Maybe I should have" (R. p. 76), except that the Trial Examiner was satisfied that he himself had discredited the witnesses of the respondent by his cross-examination of them? Such interest becomes prejudicial, especially since it is highly improbable that the Trial Examiner would admit his own inability to injure the credibility of the witnesses for the respondent. I dare say that many attorneys and counsellors in the past have felt at various times in connection with litigation before a trial judge that they discredited opposing witnesses by means of cross-examination, but not always has the judge or jury, as the case may be, agreed with such attorneys.

Is this not one of those instances covered by the language of this Honorable Court in the case of *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U.S. 292, wherein this Honorable Court stated: "Regulatory commissions

have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. *West Ohio Gas Co. v. Public Utilities Comm'n (No. 1), supra, p. 70; West Ohio Gas Co. v. Public Utilities Comm'n (No. 2)*, 294 U.S. 79; *Los Angeles Gas & Electric Corp. v. Railroad Commission*, 289 U.S. 287, 304. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (*St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 73) of a fair and open hearing be maintained in its integrity. *Morgan v. United States*, 298 U.S. 468, 480, 481; *Interstate Commerce Comm'n v. Louisville & N.R. Co., supra.* The right to such a hearing is one of 'the rudiments of fair play' (*Chicago, M. & St. P. Ry. Co. v. Polt*, 232 U.S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement. *West Ohio Gas Co. v. Public Utilities Comm'n (No. 1), (No. 2), supra; Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 682. Cf. *Norwegian Nitrogen Co. v. United States, supra.* There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored''? Cf. *Morgan* v. *United States*, 304 U.S. 1.

Likewise, as in the case of Montgomery Ward & Co. *supra*, the Trial Examiner in the instant case, as a result of his cross-examination (R. pp. 328-331), brought out a new charge against the respondent and, against the objection of counsel for the Board as well as that of the respondent, insisted that a new complaint be issued. He

thereafter was successful in securing a stipulation disposing of such charge. He then proceeded to use this disposed-of charge as the basis for his findings. The Court below treated this matter as an "inconsequential issue." I cannot believe that this Honorable Court would permit such an innuendo to remain on the record unchallenged.

Having discussed the matter and manner in which the Trial Examiner discredited the witnesses of the respondent, we come next to the language of the Court below with reference to the Trial Examiner as follows: "In so doing he did much to destroy any faith in his impartiality . . ." What did the Court below mean? Did the Court below mean that the respondent would be in a position to lose faith in his impartiality, or does the statement mean that upon judicial review the record sustains the fact that he did destroy any faith in his impartiality? I respectfully submit that the Court below must have come to the conclusion, in writing such an opinion, that he did in fact destroy any faith in his impartiality. Yet they do not conclude that he was partial, and I respectfully state that I cannot reconcile the basis for such omission so to find. The added statement by the Court below—"and had this been a close case his conduct might have been sufficient cause for a denial of this petition"—departs entirely from accepted judicial proceedings, and appears to circumvent a finding that the Trial Examiner was partial. I cannot agree with the statement of the Court below when it states: "The result was right, and though the trial examiner's conduct may have caused the respondent needless trouble and expense, whatever harm was done to the cause of good administration of the Act did not make the order itself erroneous." The Trial Examiner's conduct not only caused the respondent needless trouble and expense, but destroyed any faith in the administration of the National Labor Relations Act by the self-appointed judges of the Board who participate

in cases such as these in the prosecution of charges about which they should exercise or show no interest whatsoever towards either party.

What harm can result to the administration of the Act if, as the petitioner claims, it had not received a fair hearing, and this Honorable Court grants certiorari, and after a hearing directs the Court below to order the case remanded to the National Labor Relations Board for a new hearing? The petitioning corporation is a responsible company and is able to pay its financial debts and carry out its obligations and responsibilities. The principle involved does not harm the National Labor Relations Board, nor does it discredit the Act. On the contrary, such a rehearing would confirm the faith that litigants have enjoyed towards the judiciary, especially where the resulting consequences, if any, accrue to the petitioner. To permit the language of the Court below to remain as a final determination will do more harm in confusing the intent of this Honorable Court in the face of existing decisions.

At the argument in the Court below, the petitioner stressed the necessity of disposing of the issue of the unfair hearing rather than delving into the nonexistence of substantial evidence to support the findings. This was necessary because the question of the fair hearing became fundamental, and, as is alleged in the case at bar, since the Trial Examiner was partial, no credence could be given to the disposition of the factual evidence as announced in his recommendations and accepted by the Board as its own.

The petitioner therefore respectfully appeals to the discretion of this Honorable Court and requests that it be given an opportunity to be heard on the many points involved herein which were necessarily omitted because of the desire by the petitioner to limit itself within the scope of the rules of this Honorable Court in being as brief as possible, fully realizing, however, that the granting of the

writ for certiorari does not mean that this Honorable Court will eventually substantiate the position of the petitioner but rather will give the opportunity sought by the petitioner to be fully heard on all its contentions. A clear and concise opinion from this Honorable Court will do much to prevent the confusion that will result should the decision of the Court below be permitted to stand.

Respectfully submitted,

ALLAN SESERMAN.

"Trial Examiner Whittemore: Just one point which I think was perhaps inadvertently overlooked in asking you about this diagram.

"Do you recall where it was that you were when you heard this name? If so, will you mark it with a circle and a dot in the center?

"The Witness: Approximately there. (Marking diagram.)

"Trial Examiner Whittemore: Now where were you facing when you heard that name? Will you indicate that with a short line from the top, pointing in the direction in which you were facing with an arrow?

"Mr. Paradise: He is indicating a southerly direction, Mr. Examiner, slightly to the east.

"Trial Examiner Whittemore: Well, if that is the case, your back was turned to him?

"The Witness: That is right.

"Trial Examiner Whittemore: About how far away would you say it was?

"The Witness: Two or three steps.

"Trial Examiner Whittemore: Six to ten feet, would you say? How far do you travel per step?

"The Witness: I can show you.

"Trial Examiner Whittemore: About three feet?

"The Witness: I never measured my steps. I would say it was about six feet away, if I made a guess, five to six feet away.

"Trial Examiner Whittemore: Your back was turned to him?

"The Witness: That is right.

"Trial Examiner Whittemore: And if this is correct, at least your side was turned towards Baker?

"The Witness: Yes, sir.

"Trial Examiner Whittemore: About how far away was Baker from you?

"The Witness: About how far away was Baker from me?

"Trial Examiner Whittemore: Yes. If this plan is accurate, Baker was just about the same distance from you that Amato was. Is that correct?

"The Witness: That is the way it looks, yes.

"Trial Examiner Whittemore: Were you looking at Baker?

"The Witness: No.

"Trial Examiner Whittemore: With all the noise, it is quite conceivable that Baker made the statement; is it not?

"The Witness: No, I think I could have recognized Baker's voice as compared with Amato's voice.

"Trial Examiner Whittemore: You only think you could?

"The Witness: That is right.

"Trial Examiner Whittemore: Why didn't you ask one or the other, to find out which it was?

"The Witness: Why didn't I ask one or the other to find out which it was?

"Trial Examiner Whittemore: Yes, as you say now you only think it was Amato.

"The Witness: I felt sure to myself that it was Amato.

"Trial Examiner Whittemore: Why did you feel sure, if you did not ask him?

"The Witness: Because I had just been talking to him and heard his voice.

"Trial Examiner Whittemore: He didn't call you any name when you were talking to him, did he?

"The Witness: No.

"Trial Examiner Whittemore: Is there anything that took place in the conversation which you have related which would give rise to his calling you a name?

"The Witness: No, sir.

"Trial Examiner Whittemore: But you assumed that that was the name which he called you?

"The Witness: I assumed that that was the name which he called me? I heard the name.

"Trial Examiner Whittemore: Can you give any explanation as to why he should have called you that name?

"The Witness: No, I can't give any direct explanation.

"Trial Examiner Whittemore: Were you not curious to find out at the time?

"The Witness: I was surprised.

"Trial Examiner Whittemore: Well, there was a possibility that you might have misunderstood, was there not?

"The Witness: I don't think there was. I thought I would go back to Mr. Boak's office and talk it over, at least.

"Trial Examiner Whittemore: You are now testifying, however, that it might have been Baker?

"The Witness: I don't testify that. I would recognize Baker's voice.

"Trial Examiner Whittemore: Do you deny that it might have been Baker?

"The Witness: Well it never entered my mind that it might have been Baker.

"Trial Examiner Whittemore: You are convinced that it must have been Amato?

"The Witness: That is right.

"Trial Examiner Whittemore: But nothing in Amato's conversation occurred which led you to that belief, or nothing occurred in Amato's conversation which would cause him to make that remark?

"Now, why did you think it must have been Amato?

"The Witness: He had a resentful tone. I would say that.

"Trial Examiner Whittemore: But he didn't call you any names while he was talking with you?

"The Witness: No, sir.

"Trial Examiner Whittemore: Well, in answering him, do you recall whether or not your voice expressed any emotion?

"The Witness: I don't think it did. I think I had my natural voice.

"Trial Examiner Whittemore: Did you have to raise your voice to talk to him because of the noise of the machines?

"The Witness: No, sir. There are not any machines there, but just work benches in that vicinity.

"Trial Examiner Whittemore: Do you know the definition of the word 'prig'?

"The Witness: Do I know the definition of it?

"Trial Examiner Whittemore: Yes.

"The Witness: Well, do you mean, that can be found in the dictionary?

"Trial Examiner Whittemore: Yes.

"The Witness: Well, it is a sticker, or something of that nature.

"Trial Examiner Whittemore: How do you spell the word I just asked you the definition of in my question?

"The Witness: P-r-i-c-k.

"Trial Examiner Whittemore: I will ask the reporter what he took down when I asked the question.

"(Question read.)

"The Witness: Oh, prig, p-r-i-g?

"Trial Examiner Whittemore: I am how far from you?

"The Witness: I think that was put rather tricky; I was not expecting anything like that.

"Trial Examiner Whittemore: I am not asking for any explanation, but I am asking you about how far I am away from you.

"The Witness: Five or six feet.

"Trial Examiner Whittemore: That is all."